FORM NLRB-4477

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD (Sacramento, California)

GUDGEL ROOFING, INC. d/b/a
YANCEY ROOFING **1/**

Employer-Petitioner

and

,

UNITED UNION OF ROOFERS, WATERPROOFERS, AND ALLIED
WORKERS LOCAL UNION NO. 81, AFL-CIO **2**/

Union

20-RM-2825 **DECISION AND ORDER**

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.3/

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.**4/**

3. The labor organization*(s)* involved claim*(s)* to represent certain employees of the Employer. **5/**

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. **6/**

ORDER

IT IS HERBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by November 30, **1999.**

Dated November 16, 1999

at San Francisco, California

/s/ Alan B. Reichard
Acting Regional Director, Region 20

1/ The name of the Employer-Petitioner is in accord with the stipulation of the parties.

2/ The name of the Union is in accord with the stipulation of the parties.

3/ At the hearing, the Employer-Petitioner objected to the hearing officer's ruling allowing the Union to submit into evidence a copy of its current collective-bargaining agreement (herein called the Agreement) after the close of the hearing. I find no prejudicial error in the hearing officer's ruling in this regard as the specific contents of the Agreement are not critical to the determination made herein and the existence of the Agreement does not appear to be disputed.

4/ The parties stipulated, and I find, that the Employer-Petitioner is a California corporation with an office and place of business in Sacramento, California, where it is engaged in the construction industry as a roofing contractor doing primarily commercial, industrial and office roof construction. During the calendar year ending December 31, 1998, the Employer-Petitioner, in conducting its roofing business, as described herein, purchased and received at its Sacramento, California facility, goods valued in excess of $50,000 directly from points located outside the State of California. Based on the parties' stipulation to such facts, it is concluded that the Employer-Petitioner is engaged in commerce and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this case.

5/ The parties stipulated, and I find, that the Union is a labor organization within the meaning of the Act.

6/ The Employer-Petitioner seeks an election among six employees employed on a public works project for the City of Sacramento (herein called the Project) as described below. The Union asserts that the petition should be dismissed because the Employer-Petitioner is merely seeking by this petition to avoid adherence to the project agreement covering this Project. In the alternative, the Union argues that if an election is to be conducted, the only appropriate unit would consist of all employees employed by the Employer-Petitioner and not be limited to those performing work only on the Project.

The record discloses that the Employer-Petitioner has subcontracted with Kiewit Pacific Company (herein called Kiewit), a general contractor, to perform roofing work on the Project. The Project is making improvements on the City of Sacramento's sewer system, including renovations to +a waste water treatment facility.

The record contains a copy of the subcontract between the Employer-Petitioner and Kiewit dated March 27, 1999. By its terms, the subcontract requires that the Employer-Petitioner abide by the terms of Exhibit A appended thereto which includes a document called the "Project Labor Agreement City of Sacramento Sump 2 Improvements Project," (herein called the Project Agreement), between the City of Sacramento and all unions signatory thereto. The Union is one of the unions signatory to this Project Agreement with the City of Sacramento.

Under the Project Agreement, the City of Sacramento requires that every employer, union and employee working on the Project agree to be bound by the terms of the Project Agreement. Specifically, it requires that prior to commencing any work on the Project, subcontractors must execute a letter of assent to be bound by each and every term of the Project Agreement.

Under the terms of the Project Agreement, employers and unions working on the Project must agree to be bound by the terms of the applicable master collective-bargaining agreements for their respective trades to the extent they are incorporated into the Project Agreement and are not inconsistent with it. The Project Agreement states, however, that "An Employer that is not signatory to a Master Labor Agreement or any successor agreement shall not become bound to that agreement by executing this agreement." Under Article 20 of the Project Agreement, all employees employed by employers to perform work on the project must, within 7 days after the date of their employment, become members of and maintain membership in the appropriate union for the duration of their work on the Project." This article states that membership under this section shall be satisfied by the tendering of periodic dues and fees uniformly required to the extent required by law. The terms of the applicable collective-bargaining agreements incorporated into the Project Agreement include those pertaining to wage scales and benefits. One of the master agreements incorporated into the Project Agreement is the current master agreement for the Union, herein called the Agreement.

As indicated above, the Employer-Petitioner is a construction industry contractor which employs about 55 employees. It performs work on various construction projects from the Northern California border south to Bakersfield, California, and from the West Coast of California into Nevada. At the time of the hearing, the Employer-Petitioner was working on approximately ten projects, in addition to the Project. Approximately ten of the Employer-Petitioner's 55 employees had performed work on the Project. At the time of the hearing, six employees were employed on the Project.

The Employer-Petitioner signed a subcontract with Kiewit which bound it to the terms of the Project Agreement described above. It commenced work on the Project in April or May 1999. The record shows that the Employer-Petitioner had no history of collective bargaining from about 1984, until the date it signed the subcontract with Kiewit binding it to the terms of the Project Agreement and thus to the terms of the Union's Agreement to the extent incorporated into the Project Agreement.

The Employer-Petitioner acknowledges that it signed the subcontract and the applicable legal documents described above, but asserts that it was nonetheless unaware when it commenced working on the Project that it was bound by the terms of the Union's Agreement. It acknowledges that it did not abide by such terms until it was notified by a representative of general contractor Kiewit of its obligation in this regard.

The Employer-Petitioner also asserted that in approximately May 1999, during one of the four days that its employees performed worked on the Project, Union representative Ralph Silva came to the Project and demanded that the Employer-Petitioner comply with the Agreement's wage scale; transmit benefits to the Union's trust fund for its employees; and that its employees join the Union as required under the terms of the Agreement and the Project Agreement.

At the hearing, the Employer-Petitioner represented that the Union had never attempted to demonstrate majority status to it or asked the Employer-Petitioner to execute any document agreeing to voluntarily recognize the Union as the exclusive representative of its employees. The Union represented that had no knowledge of any effort on its part to assert majority status among the Employer-Petitioner's employees; acknowledging only that it had asked the Employer-Petitioner to abide by the Project Agreement incorporating its own Agreement. In response to a question put it its representative by the hearing officer, the Union's counsel represented that the Union's Agreement was a Section 9(a) agreement. However, the record discloses no evidence that the Union ever claimed majority status among the Employer-Petitioner's employees working on the Project or elsewhere.

In April and May 1999, the Employer-Petitioner roofed the first of four buildings which constituted its work on the Sump 2 project. At the time of the hearing, it was roofing two more buildings. At the hearing, the Employer-Petitioner asserted that the six employees working on the Project at the time of the hearing would complete their work and leave the job within a few days and the Employer-Petitioner would not perform any additional work on the Project until the next phase of the project began in approximately July 2000, when construction on the fourth building would be completed that the Employer-Petitioner was to roof. The Employer-

Petitioner asserted that the six employees who were working on the Project as of the date of the hearing would be recalled to perform the roofing work on this fourth building during the next phase of the Project in July 2000, because they were the Employer-Petitioner's most qualified roofers.

Analysis. The Employer-Petitioner seeks an election in the a unit of the six roofing employees who were working on the Project at the time of the hearing in this case to determine whether a majority of them seek to have the Petitioner represent them. The Union contends that the Employer-Petitioner is only using this petition to avoid its contractual obligations under the Project Agreement.

Under Section 9(c)(1)(B), an employer may file a petition for an election, alleging that a labor organization has presented a claim to be recognized as the bargaining representative of a unit of employees in an appropriate unit. The petitioning employer is generally required to show that the union has presented an affirmative demand for recognition in an appropriate unit.

In the instant case, the Employer-Petitioner does not assert that prior to the hearing the Union demanded recognition as a majority representative of the Employer-Petitioner's employees. Rather, the Employer-Petitioner only asserts that the Union demanded that the Employer-Petitioner abide by the terms of the Project Agreement, which includes the requirement that it remit payments to the Union's pension and other funds. Although the Union's counsel, in response to a question put to him by the hearing officer, identified the Union's master agreement as a Section 9(a) agreement, there is no evidence that the Union has ever made a claim of majority status among the Employer-Petitioner's employees at the Project or elsewhere. The Employer-Petitioner and the Union are plainly not parties to a Section 9(a) contract. At most, the situation herein is analogous to a Section 8(f) relationship although the Union and the Employer-Petitioner are not directly signatories to a Section 8(f) agreement with each other. Accordingly, I am dismissing the petition based on the lack of any demand for recognition by the Union. See *Albuquerque Insulation Contractor, Inc*., 256 NLRB 61, 62 (1981).

Further, the Employer-Petitioner seeks an election in what is an inappropriate unit since it consists of only a small number of employees who have worked on the Project and may work on the Project in the future. Accordingly, I would also dismiss the petition on this basis.

Finally, I would also dismiss this petition because it would not effectuate the Act to hold an election in this case. At the time of the hearing, the six

employees working on the Project were to finish their work within a few days and the Employer-Petitioner would not perform further work on the Project until approximately July 2000, or about eight months from the date of this decision. Further, when the Employer-Petitioner returns to work on the Project in approximately July, 2000, it will apparently be working on the Project only for a few days with a small number of employees to roof one building. Although the Employer-Petitioner asserts that the same six employees who were working on the Project at the time of the hearing would be working on the Project in July 2000, its assertion in this regard can only be viewed as speculative.

Consequently, as there are no employees of the Employer-Petitioner currently performing work on the Project; there will be no employees on the Project for the next eight months; and when the Employer-Petitioner does return it will be for only a few days with a small number of employees, I find that no useful purpose is served by directing an election in this case. Accordingly, I would also dismiss the petition for this reason. See *Davey McKee Corp*., 308 NLRB 839, 840 (1992), and cases cited therein.

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